SECTION D

ALL AGENCY MEMORANDUM NO. 174

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

DEC 2 1993

MEMORANDUM NO. 174

MEMORANDUM FOR ALL CONTRACTING AGENCIES OF THE FEDERAL GOVERNMENT AND THE DISTRICT OF COLUMBIA

FROM: MARIA ECHAVESTE
Administrator

SUBJECT: Prohibition on Department of Labor Implementation/ Administration of Davis-Bacon Helper Regulations Pursuant to Fiscal Year (FY) 1994 Appropriation Act

On Thursday, October 21, 1993, President Clinton signed the FY 1994 Appropriations Act for the Department of Labor, Health and Human Services, and Education, and related agencies (P.L. 103-112). Section 104 of this act contains a provision that prohibits the Department of Labor (Department) from expending funds appropriated under the act to implement or administer the Davis-Bacon "helper" regulations that were previously codified at 29 CFR sections 1.7(d), 5.2(n)(4) and 5.5(a)(1)(ii). (See Federal Register, 54 FR 4234, 55 FR 50148, and 57 FR 28776). Those regulations have therefore been suspended and the former rules reinstated. (See Notice of suspension of regulations and reinstatement of former regulation published in the Federal Register on November 5, 1993 (58 FR 58954), copy attached.

As of October 21, the Department of Labor ceased activities that were related to the administration and implementation of suspended helper regulations. The discontinued activities include:

- Issuing classifications and wage rates for helpers in wage determinations based on data yielded by new surveys.
- Processing survey data to determine whether the use of helpers is prevailing on construction in areas where Davis-Bacon surveys are being conducted to determine prevailing wage rates for any particular type of construction.
- Processing requests for the approval of additional classifications and wage rates for helpers pursuant to the suspended conformance procedures formerly set forth in 29 CFR 5.5(a)(1)(ii).

- o Processing requests for the reconsideration of rulings or final determinations concerning the use of helper classifications and/or wage rates.

Guidance regarding the effect of the newly enacted prohibition on contracts at various stages of the procurement process follows.

Contracts awarded on or after October 21, 1993.[1]

Contractors and subcontractors may not employ "helpers" as that term was defined in section 5.2(n)(4) of the suspended regulations on any Davis-Bacon covered contract awarded on or after October 21, 1993. Semi-skilled helper classifications and wage rates that were issued in wage determinations pursuant to the suspended regulations and that have been included in contracts awarded on or after October 21, 1993, are not valid. Moreover, the regulatory provision that allowed the consideration of additional classification actions for helpers is suspended; therefore, the Department will not consider any additional classification requests that would permit the use of helpers as defined in the suspended regulations on such contracts. Davis-Bacon general wage determinations are being modified to omit those helper classifications and wage rates that were issued pursuant to the suspended regulations.

In accordance with its prior practice, the Department will, however, recognize helper classifications that are separate and distinct classes of workers performing duties distinguished from those of journey-level workers or other classifications listed on the wage determination; whose use prevails in an area; and who are not employed in an informal apprenticeship or training capacity. As detailed in the November 5, 1993, notice, the Department will issue such helpers on wage determinations or consider additional classification requests for such helpers where these criteria are met and a specific description of duties is associated with the particular helper class. Helpers may be employed on contracts awarded after October 21, 1993, **only** if a

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[1] In the case of projects assisted under the National Housing Act, the applicable date is the start of construction or the initial endorsement of the mortgage, whichever occurs first. Similarly, in the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, the applicable date is the beginning of construction or the date the housing assistance payment contract is executed, whichever occurs first.

definition of the helper's duties establishing the helper as a separate and distinct classification is set forth in the wage determination or on the additional classification approval documents.

Contracts awarded prior to October 21, 1993 where the contract contains the newly-suspended helper clauses and the contract wage determination contains a helper classification or a helper classification has been approved for use on the project.

Contractors and subcontractors may continue to employ individuals in helper classifications that were issued for application to contracts or approved for use on contracts awarded prior to the suspension of the regulations. The workers must, however, be employed in accordance with the regulatory definition set forth in section 5.2(n)(4) of Regulations, Part 5, which was applicable at the time the contract was awarded, and the workers must be paid at least the corresponding wage rate for the helper classification in which they are performing.

The Department will continue to take action to ensure that workers erroneously classified as helpers are reclassified as journey-level workers or laborers in accordance with the work performed (those cases, for example, where employees perform work solely of a skilled nature, where individuals do not work under the supervision and direction of a journey-level classification, or where workers perform duties beyond the duties performed by helpers pursuant to the practice in the area). The Department will also take enforcement action against any contractor or subcontractor that fails to compensate its helpers according to the applicable wage determination rate or approved conformance wage rate. Contracting agencies are also reminded of their enforcement responsibilities under Reorganization Plan No. 14 of 1950 and encouraged to take action as may be necessary to ensure compliance in such situations.

Contracts awarded prior to October 21, 1993 where the contract contains the newly-suspended helper clauses but the contract wage determination does not contain a helper classification and a helper classification has not yet been approved for use on the project.

Contractors and subcontractors may not employ any classification, including helpers, on a Davis-Bacon covered project unless the wage determination contains the classification or the classification is approved pursuant to the Department's additional classification procedures. The regulations provide that the wage rates determined for unlisted classifications under the additional classification procedures shall be paid to all workers performing work in that classification from the first day on which work was performed. This regulatory provision permits retroactive application of

approved additional classifications and wage rates and, at the same time, also allows for retroactive enforcement action against a contractor or subcontractor whose proposed additional classification and/or wage rate is denied by the Department.

Clearly, the Department cannot act on conformance requests for helpers or requests for reconsideration of such conformance actions given the Congressional action. Thus, contractors or subcontractors who classify and pay individuals as helpers with the expectation that the Department will approve an additional classification request at some future point place themselves at risk of subsequent enforcement action, including the withholding of contract funds. Under these circumstances, agencies should use their enforcement discretion in determining whether withholding action is appropriate to protect the interest of employees where contractors pay individuals less than the journey-level rate during the period of the prohibition. Agencies clearly should withhold contract funds where the Department has denied a conformance request, even though the contractor or subcontractor may have or may intend to request reconsideration of the additional classification denial. Agencies should also withhold contract payments on any contracts completed or nearing completion during the suspension of the helper regulations so that any back wages potentially due employees are not lost because the contract was closed and contract funds paid out.

Contracts awarded prior to October 21, 1993 where the contract does not contain the revised helper clauses.

In implementing the helper regulations after the lifting of the prohibition imposed by section 303 of the 1991 Dire Emergency Supplement Appropriation Act, the Department suggested that contracting agencies modify existing contracts to include the revised helper contract clauses, thereafter permitting the addition of helper classifications through the additional classification procedures in section 5.5(a)(1)(ii) of Regulations, Part 5. However, in light of the Congressional action, that option no longer exists for contracts that were awarded without the helper contract clauses and which have not yet been modified. Contractors and subcontractors performing on such contracts may not employ helpers as those classifications were defined by section 5.2(n)(4) of Regulations, Part 5.

Prior background concerning the regulations in question is contained in **All Agency Memoranda Nos. 154, 161, 163 and 165,** issued on January 2, 1991, January 29, 1992, June 22, 1992, and July 24, 1992, respectively. **Application of these All-Agency Memoranda is also suspended.**

Agencies are reminded of the need to make appropriate changes in the procurement regulations (see especially 48 CFR 22.406-3, 52.222-6(b) and 52.222-9) and related contract documents to conform to the revised regulations.

Attachment

Logotype, NASA Program Identifiers, or the NASA Flags, shall be submitted to the Inspector General, NASA Headquarters, in accordance with NASA Management Instruction 9810.1, "The NASA Investigations Program."

Daniel S. Goldin,

Administrator.

[FR Doc. 93-27242 Filed 11-4-93; 8:45 am]

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DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Parts 1 and 5

Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Notice of suspension of regulations and reinstatement of former regulation.

SUMMARY: Congress has enacted legislation that prohibits the Department of Labor from implementing or administering, during fiscal year 1994, the Davis-Bacon "helper" regulations. President Clinton signed this legislation on October 21, 1993. Accordingly, the Department of Labor is suspending these regulations with respect to all contracts entered into on or after October 21, 1993.

EFFECTIVE DATE: October 21, 1993. This action is applicable only to contracts awarded on or after October 21, 1993.

FOR FURTHER INFORMATION CONTACT: William W. Gross, Acting Assistant Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3028, 200 Constitution Avenue NW., Washington, DC 20210. Telephone (202) 219-8353. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: On January 27, 1989, the Department of Labor published a final rule governing the use of semi-skilled helpers on federal and federally-assisted construction contracts subject to the Davis-Bacon and Related Acts (54 FR 4234). On December 4, 1990, the Department published a **Federal Register** notice implementing the helper regulations effective February 4, 1991 (55 FR 50148). In April 1991, Congress passed the Dire Emergency Supplemental Appropriations Act of 1991, Public Law 102-27 (105 Stat. 130), which was signed into law on April 10, 1991. Section 303 of Public Law 102-27 (105 Stat. 151) prohibited the Department of Labor from spending any funds to implement or administer the helper regulations as published, or implement or administer any other regulation that would have the same or similar effect. In compliance with this directive from the Congress, the Department did not implement or administer the helper regulations for the remainder of fiscal year 1991.

After fiscal year 1991 concluded and subsequent continuing resolutions expired, a new appropriations act was passed which did not include a ban restricting the implementation of the helper regulations. The Department issued All Agency Memorandum No. 161 on January 29, 1992, instructing the contracting agencies to include the helper contract clauses in contracts for which bids were solicited or negotiations were concluded after that date. On April 21, 1992, the United States Court of Appeals for the District of Columbia Circuit invalidated one of the provisions of these regulations that prescribed a maximum ratio governing the use of helpers, at 29 CFR 5.5(a)(4)(iv), and upheld the remaining helper provisions as valid (*Building and Construction Trades Department, AFL-CIO* v. *Martin*, 961 F.2d 269 (DC Cir. 1992)). On June 26, 1992, the Department issued a **Federal Register** notice removing 29 CFR 5.5(a)(4)(iv) from the Code of Federal Regulations to comply with the ruling of the court. Further advice regarding implementation of the helper regulations in light of the lifting of the appropriations ban and the court action was given in All Agency Memorandum No. 163, dated June 22, 1992, and All Agency Memorandum No. 165, dated July 24, 1992.

Section 104 of the Department of Labor Appropriations Act, 1994, Public Law 103-112, prohibits the Department of Labor from expending funds to implement or administer the helper regulations at 29 CFR 1.7(d), 5.2(n)(4), and 5.5(l)(ii)(A), published in the **Federal Register** at 54 FR 4234 (January 27, 1989). The conference report accompanying the appropriations measure states that the conferees are taking this action on a one-time basis and that it prohibits the Department from implementing, during fiscal year 1994 only, the Davis-Bacon helper regulations.

Accordingly, the regulations presently codified at 29 CFR 1.7(d), 5.2(n)(4), and 5.5(a)(1)(ii) are suspended until the Department of Labor publishes notice in the **Federal Register** that the prohibition on implementation of the regulations has been lifted. With respect to any contracts awarded on or after October 21, 1993, contracting agencies should advise contractors, except as set forth below, that helpers may not be used on such contracts. Additionally, contracting agencies should ensure that no other action is taken that would give force or effect to the helper regulations.

Prior to promulgation of the helper regulations which are being suspended by this notice, it was the policy of the Department that a helper classification would be approved only if it was a separate and distinct class of worker, that prevailed in the area, to perform duties that could be differentiated from the duties of journeylevel workers in the classification, as well as other classifications on the wage determination. Helpers could not ordinarily use "tools of the trade," nor could they be used as informal apprentices or trainees.

The suspension of these helper regulations reinstates this prior practice of the Department. Therefore the Department will issue helper classifications on wage determinations and approve additional helper classifications only if they meet the requirements set forth above. It has been the Department's practice, where helpers meet these requirements, to set forth a specific definition applicable to the particular classification in the wage determination. Therefore, a helper classification included in a wage determination may be utilized under contracts awarded on or after October 21, 1993, only if the wage determination includes a specific definition applicable to the particular helper classification. That definition shall apply in lieu of the definition in 29 CFR 5.2(n)(4), which is suspended by this notice.

Contracting agencies should also ensure that instead of the contract clause set forth at 29 CFR 5.5(a)(1)(ii), all contracts awarded on or after October 21, 1993, contain the contract clause which was in effect prior to implementing the revised helper regulations, and which is incorporated in the regulations at section 5.5(a)(1)(v) by this notice. This clause will be withdrawn when the appropriations bar is lifted and the suspended clause at 5.5(a)(1)(ii) is reinstated.

In the near future the Department will issue additional guidance regarding the effect of the prohibition in Public Law 103-112, on contracts entered into prior to and after October 21, 1993, by All-Agency Memorandum, to be published in the **Federal Register**.

Administrative Procedure Act

Pursuant to section 553(b)(B) of the Administrative Procedure Act, the Department finds that there is good cause for dispensing with notice and public comment concerning this suspension of a fiscal rule. Congress has directed that the Department not expend funds to implement or administer this rule for the duration of the fiscal year.

The Department also finds that there is good cause for waiving the 30-day delay in effectiveness under section 553(d)(3) of the Administrative Procedures Act, for the reason set forth above regarding waiver of prior notice and opportunity for public comment. Therefore this rule shall become effective upon October 21, 1993, the date of enactment of Public Law 103–112.

This document was prepared under the direction and control of Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects

29 CFR Part 1

Administrative practice and procedures, Government contracts, Labor, Minimum wages, Wages.

29 CFR Part 5

Administrative practice and procedures, Government contracts; Labor, Minimum wages, Penalties, Reporting and recordkeeping requirements, Wages.

Accordingly, the following action is taken:

PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

1. The authority citation for part 1 reads as follows:

Authority: 5 U.S.C. 301; R.S. 161, 64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 29 U.S.C. 259; 40 U.S.C. 276a—276a–7; 40 U.S.C. 276c; and the laws listed in appendix A of this part.

2. Section 1.7(d) is suspended.

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

1. The authority citation for part 5 continues to read as follows:

Authority: 40 U.S.C. 276a–276a–7; 40 U.S.C. 276c; 40 U.S.C. 327–332; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 5 U.S.C. 301; and the statutes listed in section 5.1(a) of this part.

2. Section 5.2 (n)(4) is suspended.

3. Section 5.5(a)(1) is amended by suspending paragraph (a)(1)(ii) and by adding a new paragraph (a)(1)(v) to read as follows:

§ 5.5 Contract provisions and related matters.

(a) * * *

(1) * * *

(v)(A) The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(*1*) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(*2*) The classification is utilized in the area by the construction industry; and

(*3*) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination with 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(v) (B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

Signed at Washington, DC, on this 29th day of October 1993.

Maria Echaveste,

Administrator, Wage and Hour Division.

[FR Doc. 93–27371 Filed 11–3–93; 11:03 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

RIN–0720–AA16

[DoD 6010.8–R]

Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Specialized Treatment Services; Nonavailability Statements; Peer Review Organization Program; Supplemental Care

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: This final rule: establishes a Specialized Treatment Services Program, under which CHAMPUS beneficiaries in need of certain highly specialized medical care will be referred to specially designated national or regional, military or civilian treatment facilities; revises a number of procedures applicable to the CHAMPUS Peer Review Organization program; and expands reliance on CHAMPUS payment rules and procedures for purposes of the supplemental care program, which applies to services provided by civilian providers to active duty members and certain other patients referred by military providers.

EFFECTIVE DATE: This final rule is effective December 6, 1993.

ADDRESSES: Office of the Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS), Office of Program Development, Aurora, CO 80045–6900. For copies of the **Federal Register** containing this final rule, contact the Superintendent of